Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of the Application of	)	
	)	WT Docket No. 95-11
HERBERT L. SCHOENBOHM, Kingshill, Virgin Islands	)	
For Amateur Station and Operator Licenses	)	

To: Administrative Law Judge Edward Luton

BUREAU'S REPLY TO APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Chief, Wireless Telecommunications Bureau (Bureau), respectfully submits, by her attorneys, the following reply to the applicant's Proposed Findings of Fact and Conclusions of Law, pursuant to Section 1.263 of the Commission's Rules, 47 C.F.R. § 1.263.

SCHOENBOHM'S PROPOSED FINDINGS OF FACT

1. Schoenbohm's Proposed Findings of Fact uncritically accept his oral and written testimony as accurate. This approach ignores the many difficulties with Schoenbohm's testimony. As discussed in the Bureau's Proposed Findings of Fact and Conclusions of Law at Paragraph 25, Schoenbohm testified inconsistently (Bureau Findings of Fact, Paragraphs 8, 9, and 16); testified incredibly about his solicitation of an ex parte presentation (Bureau Findings of Fact, Paragraph 16) and about his pension rights (Bureau Findings of Fact, Paragraphs 7 and 8); and mischaracterized his conviction as being solely for knowing certain access codes (Bureau Findings of Fact, Paragraph 6)

rather than for the fraudulent use of counterfeit access codes, the offense that Schoenbohm was actually convicted of (Bureau Findings of Fact, Paragraph 4).

2. The most glaring inaccuracy resulting from this uncritical approach is the mischaracterization, in Paragraph 1 of Schoenbohm's Proposed Findings of Fact, of Schoenbohm's felony conviction as being for "possessing a counterfeit access device, i.e., ... having knowledge of certain telephone numbers that could be used to make long distance telephone calls without paying for them" rather than for the fraudulent use of counterfeit access codes, the offense that Schoenbohm was actually convicted of.

3. The proposed finding, in Paragraph 3 of Schoenbohm's Proposed Findings of Fact, that Schoenbohm lost at least $150,000 in pension benefits is insupportable because Schoenbohm's testimony about his pension benefits was incredible (Bureau Findings of Fact, Paragraphs 7 and 8; Bureau Conclusions of Law, Paragraph 25).

4. The proposed finding, in Paragraph 6 of Schoenbohm's Proposed Findings of Fact, that Schoenbohm was appointed "Director of Transportation under the Department of Property and Procurement of the Virgin Islands Government" should be rejected because it is contradicted by Schoenbohm's testimony that he was appointed "Coordinator of Transportation, Property and Procurement." (Bureau Findings of Fact, Paragraph 9)

5. The proposed finding, in Paragraph 8 of Schoenbohm's

Proposed Findings of Fact, that Schoenbohm specifically disclosed his criminal conviction to Delegate Victor Frazer before Delegate Frazer hired him as a Field Representative is insupportable and should be rejected because it is in conflict with Delegate Frazer's declaration (Schoenbohm Exhibit 4). In Paragraph 2 of Delegate Frazer's declaration he states "I am aware that in 1992 [Schoenbohm] was convicted of the crime of possessing a counterfeit access device to make long distance telephone calls." Since Schoenbohm was actually convicted of the crime of fraudulently using a counterfeit access device, this indicates that Schoenbohm did not disclose the true nature of his crime to Delegate Frazer. Apparently Schoenbohm made the same mischaracterization to Delegate Frazer that he later made in his testimony and in his Proposed Findings of Fact.

6. The proposed findings, in Paragraph 7 of Schoenbohm's Proposed Findings of Fact, that Schoenbohm disclosed his criminal conviction to Virgin Islands Governor Roy L. Schneider at the time of his job interview and that the governor was fully aware of his conviction but hired him anyway are supported only by Schoenbohm's self-serving testimony. These proposed findings should be rejected. As indicated above, in Paragraph 6, Schoenbohm also claimed that he fully disclosed his conviction to Delegate Frazer but did not actually do so. Therefore, Schoenbohm's uncorroborated testimony that he made a full disclosure to Governor Schneider cannot be accorded any credence.

7. The proposed finding, in Paragraph 12 of Schoenbohm's

Proposed Findings of Fact, that Schoenbohm's belief (on the basis of information obtained from persons who heard his amateur radio transmissions on April 3, 1995) that he was asked to furnish Delegate Frazer's address "confirms" Schoenbohm's "prior recollection" that he "never requested anyone to write to the delegate or any other government official" (Schoenbohm Exhibit 7, p. 1) is another example of the uncritical acceptance of Schoenbohm's testimony. It should be rejected for two reasons. First, there is no logical nexus between Schoenbohm's "prior recollection" and his later belief: Schoenbohm's being asked to furnish an address (and responding by furnishing it) does not eliminate the possibility that he furnished the address in order to encourage an ex parte contact. Second, the plain meaning of Schoenbohm's words indicates that he did intend to solicit an ex parte contact (Bureau Proposed Findings of Fact, Paragraph 15; Bureau Conclusions, Paragraph 19). The finding, in Paragraph 12 of Schoenbohm's Findings of Fact, that Schoenbohm's claims are corroborated by the stipulation that the Commission did not receive any letters from elected officials on Schoenbohm's behalf is also insupportable. Because not every solicitation generates an ex parte presentation, the nonreceipt of an ex parte presentation is of no value in determining whether a solicitation was made.

8. Paragraph 16 of Schoenbohm's Proposed Findings of Fact includes: "If, in fact, Dellinger has [had?] so interpreted Schoenbohm's remarks, Dellinger would have written his own letter

to his own Congressman or Senator on Schoenbohm's behalf. Dellinger did not feel that it would be appropriate to write to Delegate Victor Frazer." These proposed findings are insupportable because they are based on material that was stricken from the record (Tr. 93).

9. None of Schoenbohm's Proposed Findings of Fact that differ from the Bureau's Proposed Findings of Fact should be included in the Initial Decision. Schoenbohm's findings are based mainly on self-serving testimony and -- in view of the problems discussed above -- are generally unreliable. All of the findings of fact needed for the Initial Decision are contained in the Bureau's Proposed Findings of Fact.

SCHOENBOHM'S CONCLUSIONS OF LAW

10. In Paragraph 1 of his Conclusions, Schoenbohm erroneously asserts that, in 1986, the Commission adopted "a new policy for broadcast applicants, declaring that felony convictions would be considered only if those convictions were 'broadcast related.'" He cites Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1183 (1986), recon., 1 FCC Rcd 421,424 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987). Schoenbohm has created this "new policy" out of whole cloth. The cited policy statement contains no such policy; instead it allows the Commission to consider convictions of crimes involving dishonesty and felony convictions for which it can be demonstrated that there is a "substantial relationship

between the criminal conviction and the applicant's propensity to be truthful or comply with the Commission's rules and policies." Id. at 1196-1197.

11. Schoenbohm's misreading of Commission policy continues in Paragraph 2 of his Conclusions. Schoenbohm claimed that, in its 1990 policy statement, the Commission "made it clear that, with respect to non-broadcast licensees, non-FCC related felony convictions and other non-FCC related misconduct, would be excluded from consideration in passing upon the qualifications of an applicant for a construction permit or a license." The authority cited for this is Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 3252 at para. 7 (1990). Such a proposition is not contained in the cited paragraph or anywhere in the 1990 policy statement. The cited paragraph actually deals with conditioning license grants on the outcome of judicial proceedings involving non-FCC misconduct.

12. The claim in Paragraph 3 of Schoenbohm's Conclusions that Schoenbohm "has a good, if not outstanding, record as an amateur licensee" is erroneous. As pointed out in the Bureau's Conclusions at Paragraph 27(f), the record of this case does not indicate whether Schoenbohm has an overall record of compliance in the operation of his station. The public service activities described in Paragraph 3 of Schoenbohm's Conclusions have no mitigating effect. David B. Hodges, 4 FCC Rcd 8692, 8692 (1989). Such activities, therefore, are not relevant in evaluating Schoenbohm's qualifications.

13. Paragraph 4 of Schoenbohm's Conclusions begins with another flat out mischaracterization of Schoenbohm's felony conviction. In Paragraphs 4 and 8 of Schoenbohm's Conclusions, Schoenbohm contends that the events on which his conviction is based are too "remote in time" to affect his qualifications. This is incorrect. As pointed out in the Bureau's Conclusions at Paragraph 27(c), the Commission, in a renewal case, may consider any conduct occurring within the current license term. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1229 (1986). Furthermore, the case cited by Schoenbohm, Alessandro Broadcasting Co. , 99 FCC 2d 1, 56 RR 2d 1568 (Rev. Bd. 1984) does not support his argument. In that case the conviction under consideration occurred in 1971 -- 13 years before the decision -- compared with three years in this case. (The decision in Alessandro, supra, does not indicate the date of the events that were the basis of the conviction.)

14. Schoenbohm also claims in Paragraph 4 of his Conclusions that he "has suffered enough." As pointed out in the Bureau's Conclusions at Paragraph 27(i), the purpose of this proceeding is to determine Schoenbohm's qualifications for an amateur license. A denial of Mr. Schoenbohm's pending application on the basis that he is unqualified would not be punitive. In Re Applications of RKO General, 78 FCC 2d 1, 115-116 (1980). See also Robert P. Milbert, 71 FCC 2d 1291, 1294 (Rev. Bd. 1979) and Charles A. Stevens, Sr., 75 FCC 2d 294, 298 (Rev. Bd 1979). The punishment resulting from Mr. Schoenbohm's criminal conviction, therefore,

cannot be a mitigating factor in this case.

15. In Paragraphs 5-7 of Schoenbohm's Conclusions, he argues that the felony of which he was convicted is not "FCC-related" and, therefore, is not "cognizable under current FCC policy." As pointed out above in Paragraph 11, the Commission does not have any policy that excludes "non-FCC related misconduct" from consideration in nonbroadcast cases. Furthermore, Schoenbohm's crime was FCC-related because it involved, as an essential element, the use of a communications service regulated by the Commission (long distance telephone service). As support for the proposition that Schoenbohm's crime is not FCC-related, he cites In Re Application of Richards, FCC 95R-04, a case in which the applicant was convicted of felony marijuana possession with intent to distribute. Schoenbohm claims that because the Commission did not find Richards' crime to be "FCC-related" -- even though pagers and cellular phones were found on his property -- it should not find Schoenbohm's crime to be "FCC-related." This is erroneous reasoning . First, the Commission did not make any determination as to whether Richards' crime was "FCC-related." Second, there was also no determination as to whether Richards used the pagers and cellular phones in connection with his crime. Id. Third, even if Richards had used his pagers and cellular phones in connection with his crime, the use would have been merely incidental to the crime of possessing marijuana whereas the use of a telephone was an essential element of Schoenbohm's crime.

16. In Paragraph 9 of Schoenbohm's Conclusions, he claimed that "... nobody except Schoenbohm actually suffered any financial loss as a result of the events that led to Schoenbohm's conviction." This is incorrect. Schoenbohm's theft of long distance telephone service caused a financial loss to the carrier, which would have received revenue if Schoenbohm had paid for his calls. This contrasts with Richards, supra, where no one except Richards suffered a financial loss.

17. In Paragraph 10 of his Conclusions, Schoenbohm argues that he has been rehabilitated. He claims that the willingness of employers to hire him for responsible positions demonstrates that he enjoys a good reputation in his community and, therefore, the extent of his rehabilitation. As pointed out in the Bureau's Conclusions at Paragraph 27(g)(v), this kind of reasoning is fallacious. Both of Schoenbohm's jobs are political appointments. His selection, therefore, was not necessarily based on merit. The role, if any, of Schoenbohm's character in his selection is unknown. [As pointed out in Paragraphs 5 and 6, above, Delegate Frazer did not know the true nature of Schoenbohm's crime, apparently because Schoenbohm misled him, and there is no proof, except for Schoenbohm's self-serving, testimony that Governor Schneider knew the true nature of Schoenbohm's crime.] If Schoenbohm's employers did have any first-hand knowledge of his reputation in the community for good character, then the best evidence of this reputation would have been their testimony -- but Schoenbohm did not offer such testimony. By contrast, the

applicant in Richards, supra, produced 26 character witnesses.

18. In Paragraph 11 of Schoenbohm's Conclusions, he claims that, in light of his "otherwise spotless record" before and after his felony and his "full rehabilitation," his conviction should not be barrier to renewing his amateur licenses. This reasoning is fallacious because Schoenbohm does not have an "otherwise spotless record." As discussed below and in the Bureau's Conclusions at Paragraphs 19-22, Schoenbohm flouted the Commission's ex parte rules. By violating the ex parte rules, Schoenbohm demonstrated that he has not been rehabilitated.

19. In Paragraph of 12 of Schoenbohm's Conclusions, he claims that John Dellinger "corroborated" Schoenbohm's testimony that he "would never knowingly violate a rule." This is another flat out misstatement of the record. Schoenbohm did not testify that he would never knowingly violate a rule and Dellinger's testimony to that effect (Schoenbohm Exhibit 6) was stricken from the record (Tr. 92).

20. Schoenbohm concedes in Paragraph 13 of his Conclusions that he did violate the ex parte rules by writing to elected officials to seek assistance with his case. He claims that this occurred because he had no knowledge of the Commission's rules. In Paragraph 14 of his Conclusions, Schoenbohm claims that, on April 3, 1995, he did not request that anyone make an ex parte presentation. As discussed in the Bureau's Conclusions at Paragraph 19, this is contradicted by the plain meaning of Schoenbohm's words.

21. In Paragraph 14 of his Conclusions, Schoenbohm also claims that he was "entirely ignorant of the anti-solicitation rule" at the time of his April 3, 1995, amateur transmissions. This is contradicted by Schoenbohm's own testimony. According to Schoenbohm's declaration, his attorney explained the ex parte rules to him in March 1995 (Schoenbohm Exhibit 7), which was before the April 3, 1995, amateur transmissions.

22. In Paragraph 15 of his Conclusions, Schoenbohm claims that any violation by him of the anti-solicitation rule was "innocent" and "technical." This is simply not true. Schoenbohm's violation of the ex parte rules on April 3, 1995, was neither innocent nor merely technical. On April 3, 1995, Schoenbohm knew about the Commission's ex parte rules and that his earlier solicitations had violated those rules. The plain meaning of Schoenbohm's words on April 3, 1995, shows that he intended to solicit others to make ex parte presentations (Bureau Conclusions, Paragraph 19). Schoenbohm's solicitation over an amateur radio frequency, on which it could have been heard by many amateurs, had the potential to generate multiple ex parte presentations. The apparent failure of Schoenbohm's efforts to actually generate any ex parte presentations is fortuitous.

23. In Paragraph 16 of his Conclusions, Schoenbohm argues that any ex parte violation by him was "far less serious" than the ex parte violation in Pepper Schultz, 4 FCC Rcd 6393 (Rev. Bd. 1989), a case in which the Commission declined to disqualify an applicant who solicited an ex parte presentation. Schoenbohm

argues that, in contrast to his case, the solicitation in Pepper Schultz, supra, actually did result in ex parte presentations and the behavior of the applicant in Pepper Schultz, supra, "was not entirely innocent or unintentional." Id. at 6403. As pointed out above, the apparent failure of Schoenbohm's efforts to actually generate any ex parte presentations is fortuitous. Furthermore, as pointed out in the preceding paragraph, Schoenbohm's solicitation of ex parte presentations was not innocent.

24. The differences between this case and Pepper Schultz, supra, actually show that Schoenbohm's violation of the anti-solicitation rule was the more serious. In Pepper Schultz, supra, the ex parte solicitation was found to be "... not repeated and not made in face of specific knowledge of the Commission's rules ..." Id. at 6403. By contrast, Schoenbohm solicited ex parte contacts after he had received advice from counsel following earlier prohibited solicitations. In Pepper Schultz, supra, the solicitation consisted of a letter to a single senator, Id. at 6403, while Schoenbohm's solicitation on an amateur frequency had the potential to generate multiple ex parte presentations.

25. The most important difference between Pepper Schultz, supra, and this case is that, in Pepper Schultz, which was a comparative case, the applicant who solicited the ex parte presentation did not have a felony conviction for fraudulent conduct. Schoenbohm's solicitation of ex parte contacts cannot be

considered -- as Schoenbohm does -- in isolation from his felony conviction. Schoenbohm's conviction evinces a likelihood that, if his application is granted, the Commission will not be able rely on him to be truthful or to comply with the Communications Act and Commission's Rules and policies. Schoenbohm's flouting of the Commission's ex parte rules is the final "nail in the coffin" showing that he can't be relied on. It is evident that Schoenbohm does not possess the requisite qualifications for a renewal of his amateur station and operator licenses.

Respectfully Submitted,

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Certificate of Service

I, Christina Gavin, certify that, on October 6, 1995, copies of the foregoing Bureau's Reply to Proposed Findings of Fact and Conclusions of Law, filed on behalf of the Chief, Wireless Telecommunications Bureau, were sent by First Class Mail to:

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